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No. 75-246

# In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

*v.*

ROY C. HOPKINS

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES

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# INDEX


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statutes and regulations involved | 2 |
| Statement | 3 |
| Summary of argument | 5 |
| Argument: | |
| The Court of Claims does not have jurisdiction to entertain a suit against the United States for damages for the improper discharge of an employee of a military exchange | 8 |
| A. Congress did not intend to affect the substantive rights of employees of military exchanges when it amended the Tucker Act | 14 |
| B. Employees of military exchanges are federal employees who hold their positions not by express or implied contract but by appointment | 20 |
| Conclusion | 25 |
| Appendix A | 1A |
| Appendix B | 18A |
| Appendix C | 33A |




597-252—75——1

CITATIONS

Cases:


| | Page |
|---|---|
| *Algonac Manufacturing Co.* v. *United States*, 192 Ct. Cl. 649, 428 F. 2d 1241 | 23 |
| *Borden* v. *United States*, 126 Ct. Cl. 902, 116 F. Supp. 873 | 13, 21 |
| *Bramlett* v. *Desobry*, 490 F. 2d 405, certiorari denied, 419 U.S. 872 | 18 |
| *Crenshaw* v. *United States*, 134 U.S. 99 | 8, 23 |
| *Daniels* v. *Chanute AFB Exchange and United States*, 127 F. Supp. 920 | 22 |
| *Eastport S.S. Corp.* v. *United States*, 178 Ct. Cl. 599, 372 F. 2d 1002 | 6, 10, 11 |
| *Edelstein* v. *South Post Officers Club*, 118 F. Supp. 40 | 13 |
| *Finn* v. *United States*, 123 U.S. 227 | 11 |
| *Glidden Co.* v. *Zdanok*, 370 U.S. 530 | 10 |
| *Grant* v. *United States*, 162 F. Supp. 689 | 22 |
| *Jaeger* v. *United States*, 394 F. 2d 944 | 13 |
| *J. C. Pitman & Sons, Inc.* v. *United States*, 161 Ct. Cl. 701, 317 F. 2d 366 | 23 |
| *Keim* v. *United States*, 177 U.S. 290 | 24 |
| *Keetz* v. *United States*, 168 Ct. Cl. 205 | 17, 21 |
| *Kyer* v. *United States*, 177 Ct. Cl. 747, 369 F. 2d 714 | 13 |
| *Luckenbach S.S. Co.* v. *United States*, 272 U.S. 533 | 9 |
| *McTiernan* v. *Gronouski*, 337 F. 2d 31 | 25 |
| *Munro* v. *United States*, 303 U.S. 36 | 11 |
| *Nimro* v. *Davis*, 204 F. 2d 734 | 13 |
| *Porter* v. *United States*, 204 Ct. Cl. 355, 496 F. 2d 583 | 23 |
| *Pulaski Cab Company* v. *United States*, 141 Ct. Cl. 160, 157 F. Supp. 955 | 13 |




Cases—Continued


| | Page |
|---|---|
| *Richardson* v. *Morris*, 409 U.S. 464 | 17 |
| *Rizzuto* v. *United States*, 298 F.2d 748 | 22 |
| *Sampson* v. *Murray*, 415 U.S. 61 | 23, 24 |
| *Service* v. *Dulles*, 354 U.S. 363 | 25 |
| *Soriano* v. *United States*, 352 U.S. 270 | 9 |
| *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 | 3, 9 |
| *Swiff-Train Co.* v. *United States*, 443 F.2d 1140 | 13 |
| *Taylor* v. *United States Civil Service Commission*, 374 F.2d 466 | 25 |
| *Taylor and Marshall* v. *Beckham*, 178 U.S. 548 | 8, 22–23 |
| *United States* v. *Forfari*, 268 F. 2d 29 | 22 |
| *United States* v. *Holcombe*, 277 F.2d 143 | 22 |
| *United States* v. *Jones*, 131 U.S. 1 | 10 |
| *United States* v. *King*, 395 U.S. 1 | 5, 9, 10 |
| *United States* v. *Shaw*, 309 U.S. 495 | 9, 11 |
| *United States* v. *Sherwood*, 312 U.S. 584 | 9, 18 |
| *United States* v. *Testan and Zarrilli*, No. 74–753, argued November 12, 1975 | 10–11 |
| *United States* v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506 | 11 |
| *Urbina* v. *United States*, 428 F. 2d 1280 | 23 |
| *Vitarelli* v. *Seaton*, 359 U.S. 535 | 25 |
| *Young* v. *United States*, 498 F. 2d 1211 | 17, 18, 20 |


Statutes, regulations and rule:


| | |
|---|---|
| Back Pay Act, 5 U.S.C. 5596 | 12 |
| Lloyd-LaFollette Act, 5 U.S.C. 7501 | 7, 12 |
| Longshoremen's and Harbor Workers' Compensation Act, 5 U.S.C. 8171(b) | 12 |
| Social Security Act, as added, 60 Stat. 979, and amended, 42 U.S.C. 410(a)(6)(B)(iv) | 8, 12 |
| Tucker Act, 28 U.S.C. 1491, as amended, 84 Stat. 449 | 2, 5, 9–10, 14, 17 |

Statutes, regulations and rule—Continued — Page
5, U.S.C. (Supp. III) 2105(c) — 6, 12, 1A
5 U.S.C. 8171(b) — 7, 12
5 U.S.C. 8501(1)(E) — 8, 12
10 U.S.C. 3012 — 3
10 U.S.C. 8012 — 3
28 U.S.C. 1346(a)(2) — 2, 18
29 U.S.C. 201, *et seq.* — 12
5 C.F.R. 554.1–554.15 — 3
32 C.F.R. 554.2(a) — 1A
32 C.F.R. 554.4 — 1A–2A
32 C.F.R. 554.5 — 2A–3A
32 C.F.R. 554.6 — 3A
32 C.F.R. 554.11 — 3A
Army Regulation No. 60–21/Air Force Regulation No. 147–15 (November 12, 1974): — 3, 8, 11
Chapter 1:
Section I: Para. 1–7 — 21, 3A
Section II: Para. 1–9 — 21, 24, 3A–4A
Section III:
Para. 1–13 — 22, 4A
Para. 1–17 — 22, 4A
Para. 1–21 — 22, 5A
Para. 1–22 — 22, 5A
Chapter 2:
Section I:
Para. 2–2 — 21, 5A
Para. 2–3 — 21, 5A–6A
Section II: Para. 2–12 — 22, 24, 6A
Chapter 3:
Section I: — 23
Para. 3–4 — 22, 6A
Para. 3–8 — 6A
Chapter 4:
Section II: Para. 4–19 — 22, 24, 7A–8A



Statutes, regulations and rule—Continued — Page
Army Regulation No. 60–21/Air Force Regulation No. 147–15 (May 14, 1959) — 21
Chapter 1
Section I: Para. 7 — 18A–19A
Section II: Para. 11 — 19A–20A
Section III: Para. 25 — 20A
Section VI: Para. 48 — 20A–24A
Chapter 5
Section IV:
Para. 92 — 24A
Para. 93 — 24A
Para. 94 — 25A–26A
Para. 95 — 26A–27A
Para. 96 — 4, 27A–28A
Para. 97 — 4, 28A
Para. 98 — 4, 28A
Para. 99 — 4, 29A–31A
Para. 100 — 4, 31A–32A
Para 101 — 32A
Exchange Service Bulletin No. 247 (15–52) (July 2, 1975): — 4, 23
Paragraph:
20 — 4, 15A
21 — 4, 16A
22 — 4, 16A
81–88 — 8A–11A
89 — 4, 11A–12A
90–95 — 12A–14A
95c — 4, 14A
96–97 — 14A
97a — 4, 14A
98 — 4, 15A
Rules of the United States Court of Claims, Rule 66(a)(1) — 4

Miscellaneous: Page
8 Air Force JAG Law Review (1966)---------- 3
115 Con. Rec. 3162 (1969)---------- 15
Hearings on S. 980 before Subcommittee No. 4 of the House Committee on the Judiciary, 91st Cong., 1st Sess. (1969)- 7, 15, 16
H.R. Rep. 91-933, 91st Cong., 2d Sess. (1970) ---------- 7, 15
Scolnick and Packer, *Evolution of the Army and Air Force Exchange Service,* 8 Air Force JAG Law Review 19 (Sept.-Oct. 1966)---- 3
S. 980, 91st Cong., 1st Sess. (1969)------ 15, 16
S. Rep. No. 91-268, 91st Cong., 1st Sess. (1969) ---------- 3, 7, 15, 16

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS*

## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the Court of Claims (Pet. App., pp. 1a-25a) is reported at 513 F. 2d 1360.

### JURISDICTION

The judgment of the Court of Claims (Pet. App., p. 9a) was entered on March 19, 1975. On June 11, 1975, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including August 16, 1975. The petition was filed on August 15, 1975, and was granted on October 6, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).

### QUESTION PRESENTED

Whether the Court of Claims has jurisdiction to entertain a suit against the United States for money damages for the improper discharge of an employee of a military exchange.

### STATUTES AND REGULATIONS INVOLVED

The Tucker Act, 28 U.S.C. 1491, as amended by Pub. L. 91–350, 84 Stat. 449, provides in pertinent part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.[1]

The other pertinent statutes and regulations are set forth in Appendices A and B to this brief, *infra,* pp. 1A–32A.

[1] The final sentence quoted above was added by Pub. L. 91–350 in 1970. Pub. L. 91–350 also added the identical language to 28 U.S.C. 1346(a)(2), which grants the district courts concurrent jurisdiction with the Court of Claims for claims not exceeding $10,000.



### STATEMENT

On April 18, 1958, respondent was appointed to a civilian position with the European Exchange System of the Army and Air Force Exchange Service, a nonappropriated fund instrumentality (App. C, *infra,* pp. 33A–34A).[2] On August 6, 1968, respondent was discharged because of acts of misconduct incompatible with his continued employment (Pet. App., p. 1a). Respondent's discharge was sustained upon administrative review.[3]

[2] The term "nonappropriated fund instrumentality" ~~includes~~ indicates that, with minor exceptions, no revenues are derived from the United States Treasury.

We use the phrases "military exchange" and "exchange service" throughout to refer collectively to the Army and Air Force Exchange Service, the Navy Exchanges, the Marine Corps Exchanges, the Coast Guard Exchanges, and the Exchange Councils of the National Aeronautics and Space Administration. ~~When we refer to the Army and Air Force Exchange Service we use the phrase "exchange service."~~

The exchange service constitutes the nation's third largest department store chain, with annual sales of over $3.5 billion. S. Rep. No. 91–268, 91st Cong., 1st Sess., p. 3 (1969). See generally, Scolnick and Packer, *Evolution of the Army and Air Force Exchange Service,* 8 Air Force JAG Law Review 19 (Sept.–Oct. 1966); *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 484–485. We have been advised that the total number of civilian employees of the military exchanges exceeds 100,000.

Regulations governing the Army and Air Force Exchange Service (5 C.F.R. 554.1–554.15; AR 60.21/AFR 147.15) are promulgated pursuant to 10 U.S.C. 3012 and 8012, which authorize the Secretary of the Army and the Secretary of the Air Force, respectively, to conduct all affairs of the two Departments.

[3] At the time of respondent's discharge, he was entitled to contest his discharge at a full evidentiary hearing before a grievance committee of three members, with one member of the committee designated by the aggrieved employee; the aggrieved employee was entitled to testify in his own behalf, introduce documentary evidence, call witnesses, and cross-examine adverse witnesses (see AR 60–21/AFR 147–15 (May 14, 1959), Chapter 5, Section IV,

597–252—75——2

Respondent then commenced this suit against the United States in the Court of Claims, contending that his discharge was improper and seeking back pay and allowances.[4] Jurisdiction was asserted under the Tucker Act, 28 U.S.C. 1491.

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paras. 96–99, App. B, *infra*, pp. 27A–21A). The recommendation of the grievance committee was forwarded to the installation commander, who determined the correctness of the dismissal. The employee could appeal from an adverse decision of the installation commander to the "major commander" of the area, who rendered the final decision (*id.*, para. 100, App. B, *infra*, pp. 31A–32A).

These procedures subsequently have been revised. The administrative remedies now available to a discharged employee are contained in Exchange Service Bulletin No. 247 (15–52) (July 2, 1975), App. A, *infra*, *pp.* 8A–17A. An employee is entitled to an advance notice of separation in writing at least 30 days prior to his proposed separation (*id.*, paras. 20–21, App. A, *infra*, pp. 16A–17A). The employee is entitled to present either an oral or a written reply, or both, to the notice of intended separation prior to being separated (*ibid.*). A final decision to separate an employee must be in writing and state, *inter alia*, the basis for the separation, that it is a final decision, and that the employee has 21 days within which to appeal the decision (*id.*, paras. 22, 89, App. A, *infra*, pp. 7A, 11A–12A), in which case a hearing examiner will hear the evidence (*id.*, para. 93, App. A, *infra*, p. 12A), make a written recommendation on the merits of the appeal, and transmit it to the appellate authority (*id.*, para. 95c, App. A, *infra*, p. 14A), which in almost all cases is the Commander of the Army and Air Force Exchange Service, or, in his absence, the Deputy Commander (*id.*, para. 97a, App. A, *infra*, p. 14A). The appellate authority is required to render a written determination on the appeal, noting that the determination is final and not subject to further appeal or review (*id.*, para. 98, App. A, *infra*, pp. 14A–15A).

[4] We are advised that respondent died on June 7, 1974, after the commencement of this suit but prior to the decision of the Court of Claims. The representative of respondent's estate has not yet been substituted as a party, but under Rule 66(a)(1) of the Rules of the Court of Claims a substitution of parties may be made within two years after the death of the plaintiff.



The Court of Claims denied the government's motion to dismiss for lack of jurisdiction. The court acknowledged that prior to 1970 the Tucker Act had not conferred jurisdiction to review discharges of military exchange emloyees (Pet. App., pp. 2a–4a), but the court held that the requisite jurisdiction had been conferred by a 1970 amendment to the Act, Pub. L. 91–350, 84 Stat. 449. That amendment confers jurisdiction over claims founded upon express or implied contracts with a military exchange, and the court held that respondent's relationship with the Army and Air Force Exchange Service was contractual (Pet. App., pp. 5a–9a).

Judge Skelton, noting that the 1970 amendment to the Tucker Act was intended to affect only the rights of third party independent contractors (Pet. App., pp. 11a–14a), dissented on the ground that exchange service personnel are federal employees who hold their positions not by contract but by appointment (Pet. App., pp. 15a–20a).

## SUMMARY OF ARGUMENT

The question here turns on whether the United States has waived sovereign immunity to suit by a former employee of the United States Army and Air Force Exchange Service for money damages for an allegedly improper discharge. Waiver cannot be implied but must be unequivocally expressed. *United States* v. *King*, 395 U.S. 1, 4. Such unequivocal expression must be found in a constitutional provision, statute or regulation that creates a substantive

right enforceable against the United States for these money damages or in a contract entered into by the United States. *Eastport S.S. Corp.* v. *United States,* 178 Ct. Cl. 599, 372 F. 2d 1002.

There is no constitutional provision, statute or regulation creating a substantive right, enforceable against the United States, for money damages for improper discharge from a military exchange. Neither the regulations governing employment in the Army and Air Force Exchange Service nor the statutes pursuant to which those regulations were promulgated create a substantive right to compensation from the federal government for wrongful discharge. Indeed, Congress explicitly denied to such employees this right when it excluded them from coverage of certain laws administered by the Civil Service Commission, including the Back Pay Act and the Lloyd-LaFollette Act. 5 U.S.C. (Supp. III) 2105(c).

Furthermore, such a right cannot be founded upon an express or implied contract. Prior to 1970 there was no question about this, for contracts with military exchanges were not contracts "with the United States": Congress had not appropriated funds to support military exchanges nor authorized any official of the exchange to enter into contracts on behalf of the United States. But even with enactment of the 1970 amendment to the Tucker Act, which makes contracts with military exchanges contracts "with the United States," such suits are still barred.

A. The legislative history of the 1970 amendment shows that it was designed solely to provide contractors the same remedies against military exchanges



as they had against other parts of the federal government. It was not designed to affect military exchange employees, whose substantive rights Congress previously had considered. See S. Rep. No. 91–268, 91st Cong., 1st Sess. (1969); H.R. Rep. No. 91–933, 91st Cong., 2d Sess. (1970); Hearings on S. 980 before Subcommittee No. 4 of the House Committee on the Judiciary, 91st Cong., 1st Sess. (1969). The legislative history is silent concerning claims against military exchanges by their employees, although it was clear at the time that such employees were not entitled to sue in the Court of Claims for wrongful discharge.

Military exchanges employ more than 100,000 persons. Had Congress intended to give such a vast number of individuals a forum in which to present their employment grievances it would have so indicated.

Moreover, had it so intended, Congress directly could have provided such a forum by repealing its exclusion of such employees from coverage under the laws administered by the Civil Service Commission and bringing them within the Lloyd-LaFollette Act and the Back Pay Act. Indeed, when it has intended to legislate with respect to the rights of military exchange personnel, it has done so expressly. See, *e.g.,* 5 U.S.C. 8171(b); 42 U.S.C. 410(a)(6)(B)(iv); 5 U.S.C. 8501(1)(E). In contrast, the 1970 amendment to the Tucker Act contains no reference to the right of military exchange employees to sue for back pay.

B. The 1970 amendment by its terms does not confer jurisdiction over the kind of claim respondent asserts here, which is based upon his appointment to

the exchange service rather than upon an express or implied contract.

The regulations governing exchange service employees specify that they are federal employees who hold their positions by appointment and that they are subject to regulations applicable to other federal employees (AR 60–21/AFR 147–15). Moreover, they are deemed "federal employees" for whose tortious actions the United States is liable under the Federal Tort Claims Act, and likewise they have no cause of action under that Act. Federal employees who hold their positions by appointment do not have a contractual relationship with the government. *Taylor and Marshall* v. *Beckham,* 178 U.S. 548, 576; *Crenshaw* v. *United States,* 134 U.S. 99, 104.

Accordingly, the 1970 amendment to the Tucker Act does not confer jurisdiction over suits for money damages brought by discharged exchange service employees.

## ARGUMENT

### THE COURT OF CLAIMS DOES NOT HAVE JURISDICTION TO ENTERTAIN A SUIT AGAINST THE UNITED STATES FOR MONEY DAMAGES FOR THE IMPROPER DISCHARGE OF AN EMPLOYEE OF A MILITARY EXCHANGE

This case concerns the right of a former civilian employee of the United States Army and Air Force Exchange Service to invoke the jurisdiction of the Court of Claims in a suit against the United States for money damages for an allegedly improper discharge.[5]

[5] Military exchanges themselves are instrumentalities of the United States that are immune from suit absent the express consent of the United States. *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485.



"[T]he Court of Claims' jurisdiction to grant relief depends wholly upon the extent to which the United States has waived its sovereign immunity to suit and * * * such a waiver cannot be implied but must be unequivocally expressed." *United States* v. *King,* 395 U.S. 1, 4. See also *Soriano* v. *United States,* 352 U.S. 270, 276; *United States* v. *Shaw,* 309 U.S. 495, 500–501; *Luckenbach S.S. Co.* v. *United States,* 272 U.S. 533, 536. This case turns upon whether the United States has waived sovereign immunity to this type of suit. Apart from the authority expressly conferred by statute, "there is no jurisidiction in the Court of Claims more than in any other court to entertain suits against the United States." *United States* v. *Sherwood,* 312 U.S. 584, 587–588.

Prior to 1970, the pertinent part of the Tucker Act, 28 U.S.C. 1491, that conferred jurisdiction upon the Court of Claims provided:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

That provision did not confer jurisdiction over suits brought by former employees of military exchanges for money damages for wrongful discharge, because such suits were not founded upon "the Constitution, or any Act of Congress, or any regulation, * * * or upon any express or implied contract with the United States * * *."

For the purposes of the Tucker Act, a suit is founded upon "the Constitution, or any Act of Congress, or any regulation" only if the constitutional provision, the statute, or the regulation in question creates a substantive right, enforceable against the United States, for "actual, presently due money damages." *United States* v. *King, supra,* 395 U.S. at 3; *Glidden Co.* v. *Zdanok,* 370 U.S. 530, 557; *United States* v. *Jones,* 131 U.S. 1, 18. The Tucker Act does not itself establish such a substantive right. The Act merely confers jurisdiction upon the Court of Claims in cases in which such a substantive right exists independently. As the Court of Claims observed in *Eastport S. S. Corp.* v. *United States,* 372 F. 2d 1002, 1009:

> [W]hat one must always ask is whether the constitutional clause or the legislation which the claimant cites can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained. If not, [the Court of Claims] cannot give relief under [the Tucker Act], although some separate general principle—arising, for example, from tort law—might lead to a remedy in another forum or under some special relief provision.

Thus, it is not sufficient under the Tucker Act that a plaintiff claim that he was deprived of a right granted by a constitutional provision, a statute, or a regulation; the provision upon which the claim is founded must create a substantive right to monetary compensation from the federal government. See our brief in *United States* v. *Testan and Zarrilli,* No. 74–753, argued November 12, 1975. Moreover, an executive order or regulation may create a right to monetary compensation only if promulgated pursuant to a statute that authorizes or requires the creation of such a right, for only Congress has the power to waive the immunity of the United States from suit. See, *e.g., United States* v. *U.S. Fidelity & Guaranty Co.,* 309 U.S. 506, 513; *United States* v. *Shaw,* 309 U.S. 495, 500–502; *Munro* v. *United States,* 303 U.S. 36, 41; *Finn* v. *United States,* 123 U.S. 227, 232.



Since the regulation governing employment with the Army and Air Force Exchange Service (AR 60–21/AFR 147–15) neither itself creates a substantive right to compensation from the federal government for wrongful discharge nor was promulgated pursuant to an Act of Congress creating such a right, suits brought by former employees of the exchange service for money damages for wrongful discharge are not founded upon "the Constitution, or any Act of Congress, or any regulation" within the meaning of the Tucker Act. The Court of Claims here acknowledged this when it observed that prior to 1970 the Tucker Act had not conferred jurisdiction to review discharges of military exchange employees (Pet. App., pp. 2a–4a).

Indeed, Congress has explicitly denied to such employees a substantive right to monetary compensation for wrongful discharge. To be sure, Congress has vested military exchange employees with some substantive rights against the United States. For example, such employees are granted the protection of the

597-252—75——3

Longshoremen's and Harbor Workers' Compensation Act, 5 U.S.C. 8171(b), the Social Security Act, 42 U.S.C. 410(a)(6)(B)(iv), the unemployment compensation statue, 5 U.S.C. 8501(1)(E), and various minimum wage and overtime benefit laws, 29 U.S.C. 201, *et seq.* However, Congress expressly excluded military exchange employees from the coverage of certain laws administered by the Civil Service Commission,[6] such as the Back Pay Act[7] and the Lloyd-LaFollette Act,[8] which establish other substantive rights, including the right to money damages for wrongful discharge.

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[6] 5 U.S.C. (Supp. III) 2105(c) provides in pertinent part that:

"An employee paid from nonappropriated funds of the Army and Air Force Exchange Service * * * is deemed not an employee [of the United States] for the purpose of—

"(1) laws (other than subchapter IV of chapter 53 [dealing with the prevailing rate system] and sections 5550 [also dealing with that system] and 7154 [prohibiting, in certain contexts, discrimination based on race, color, creed, sex, or marital status] of this title) administered by the Civil Service Commission; or

"(2) subchapter I of chapter 81 [dealing with compensation for work-related injuries] and section 7902 of this title [federal safety programs].

"This subsection does not affect the status of these nonappropriated fund activities as Federal instrumentalities."

[7] The Back Pay Act authorizes the retroactive recovery of wages whenever the employee has been subjected to "an unjustified or unwarranted personnel action that has resulted in the withdrawal or reduction of all or a part" of the compensation to which he was otherwise entitled. 5 U.S.C. 5596.

[8] The Lloyd-LaFollette Act provides than an individual in the competitive service may be removed or suspended without pay only "for such cause as will promote the efficiency of the service," and that such an individual is entitled to a statement of reasons for the suspension, notice of the charges against him, a copy of the charges, an opportunity to file a written answer, and a written decision on the answer. 5 U.S.C. 7501.



Furthermore, prior to 1970, it also was clear that suits by former military exchange employees were not founded "upon any express or implied contract with the United States," for contracts with military exchanges were not contracts "with the United States" within the meaning of the Tucker Act: Congress had not appropriated funds to support the military exchanges or authorized any official of the exchanges to enter into contracts on behalf of the United States. Accordingly, prior to 1970, the Court of Claims lacked jurisdiction to entertain any suits against the United States for breach of contract with military exchanges and therefore *a fortiori* lacked jurisdiction over suits brought by former exchange service employees for wrongful discharge. See, *e.g.*, *Swiff-Train Co.* v. *United States,* 443 F.2d 1140 (C.A. 5) (contract to supply carpeting); *Jaeger* v. *United States,* 394 F.2d 944 (C.A.D.C.) (suit for contractual bailment); *Pulaski Cab Company* v. *United States,* 141 Ct. Cl. 160, 157 F. Supp. 955 (contract for taxicab services); *Kyer* v. *United States,* 177 Ct. Cl. 747, 369 F.2d 714 (contract for brokerage services); *Borden* v. *United States,* 126 Ct. Cl. 902, 116 F. Supp. 873 (contract for account services); *Edelstein* v. *South Post Officers Club,* 118 F. Supp. 40 (E.D. Va.) (contract for supplies). Cf. *Nimro* v. *Davis,* 204 F.2d 734 (C.A.D.C.).

The Tucker Act was amended in 1970 by Pub. L. 91–350, which provided for the first time:

> * * * [A]n express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges,

> Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

Thus, the pivotal issue in the present case is whether an employee of a military exchange has an express or implied employment contract with the exchange that creates a substantive right to money damages for unlawful discharge. In the following sections we show that when it enacted the 1970 amendment to the Tucker Act, Congress did not recognize the existence of or intend to create such a right, and that employment relationships with military exchanges are not contractual.

### A. CONGRESS DID NOT INTEND TO AFFECT THE SUBSTANTIVE RIGHTS OF EMPLOYEES OF MILITARY EXCHANGES WHEN IT AMENDED THE TUCKER ACT.

The 1970 amendment to the Tucker Act was designed to provide contractors the same remedies against military exchanges as they had against other parts of the federal government. It was not intended to affect the substantive rights of exchange service employees who, like other federal employees, do not have a contractual relationship with the government.

As we indicated above (pp. 12–13, *supra*), Congress had considered the status of military exchange employees on several occasions prior to 1970 and had declined to provide such employees with any right to back pay for wrongful discharge. The congressional concern manifested by the amendment to the Tucker Act in 1970 was directed at the entirely separate question of the rights of independent contractors to recover money damages from the United States for a military exchange's breach of construction, supplies, or service contracts. See, *e.g.*, 115 Cong. Rec. 3162 (1969); S. Rep. No. 91–268, 91st Cong., 1st Sess., p. 2 (1969) (hereinafter Senate Report); H.R. Rep. No. 91–933, 91st Cong., 2d Sess., p. 2 (1970) (hereinafter House Report); Hearings on S. 980 before Subcommittee No. 4 of the House Committee on the Judiciary, 91st Cong., 1st Sess. (1969) (hereinafter Hearings).



Thus, in his introductory statement opening the hearings on S. 980, 91st Cong., 1st Sess. (1969) the bill which was to become the 1970 amendment, Senator Tydings, its sponsor, explained its purpose (Hearings at 4; emphasis supplied):

> In sum, I believe that S. 980 is consistent with the public policy of the United States clearly expressed in the Tucker Act, that the sovereign immunity of the United States to contract suit should be waived when complaints are filed in an appropriate forum. *S. 980 will provide contractors with nonappropriated fund activities of or under the United States or departments or agencies of the United States with the same contract remedies available to those who contract directly with those departments or agencies in furtherance of activities supported by appropriated funds.* In so doing, S. 980 will erase an anachronistic and baseless distinction between suits on contracts of the United States to be paid out of appropriated funds and those to be paid out of nonappropriated funds.

Witnesses at the Hearings repeatedly emphasized the limited scope of the proposed legislation. For ex-

ample, Lt. Col. Benjamin H. Rosker, testifying on behalf of the Department of Defense, stated (Hearings at 14):

> To this day, although a nonappropriated fund activity may bring suit against its contractors, neither the fund nor the United States may be sued. For the individual businessman who enters the marketplace, this would be an enviable advantage.

None of the witnesses at the Hearings even mentioned exchange service employees, let alone suggested that the proposed legislation would affect them in any way.

The Senate Report on S. 980 similarly reflected a congressional understanding that the proposed legislation related only to the claims of contractors with military exchanges and that its effect would be to put such contractors on an equal footing with those who contracted with federal agencies supported by appropriated funds (Senate Report at 4–5):

> S. 980 will provide contractors with nonappropriated fund activities of or under the United States or departments or agencies of the United States with the same contract remedies available to those who contract directly with those departments or agencies in furtherance of activities supported by appropriated funds.

The legislative history of the 1970 amendment is silent concerning claims against military exchanges by their employees. Although it was clear at the time that such employees were not entitled to sue for wrongful discharge in the Court of Claims, there is no direct reference in any of the reports, hearings, or



debates to that fact and no indication that Congress intended to provide a forum for such suits.[9]

As the Fifth Circuit pointed out in *Young* v. *United States*, 498 F. 2d 1211, 1215, there is no language in the legislative history that would support "an inference that Congress intended these amendments as a vehicle for redressing grievances of employees of these instrumentalities as well as settling claims of third parties with whom the instrumentalities contract for goods and services."[10] Accordingly,

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[9] One case cited in the legislative history, *Keetz* v. *United States*, 168 Ct. Cl. 205, did involve a claim arising out of the discharge of a military exchange employee. It was this citation upon which the majority of the Court of Claims relied here (Pet. App., p. 9a). However, all other cases cited in the legislative history dealt with independent contractors, not employees. Thus, as the Fifth Circuit stated in *Young* v. *United States*, 498 F. 2d 1211, 1217, n. 5:

"* * * [I]n light of the fact that these cases were cited as instances where sovereign immunity had been held to bar suits, and were not discussed on their facts either in the debates or the reports and other documents accompanying the proposed amendments, we think the mere fact that *Keetz* was cited is not enough to defeat our conclusion [that the 1970 amendment did not confer Tucker Act jurisdiction over suits by discharged exchange service employees]."

[10] The Fifth Circuit in *Young* was construing the 1970 amendment to 28 U.S.C. 1346(a)(2), but that amending language was identical to the language in 28 U.S.C. 1491 at issue here. Moreover, the purpose of the two amendments was necessarily the same, since they served to confer identical concurrent jurisdiction on the district courts and the Court of Claims. See *Richardson* v. *Morris*, 409 U.S. 464, 465–466; *United States* v. *Sherwood*, 312 U.S. 584, 591.

The Fifth Circuit nevertheless concluded in *Young*, in our view incorrectly, that it had jurisdiction under the Administrative Procedure Act. There is a conflict among the courts of appeals on that issue. See, *e.g.*, *Bramblett* v. *Desobry*, 490 F. 2d 405, 407 (C.A. 6), certiorari denied, 419 U.S. 872.

Judge Skelton correctly observed in his dissent here (Pet. App., p. 13a) that the amendment represents "[t]he intention of Congress to close a loophole with respect to contractual claims of third party independent contractors * * *" and has nothing whatever to do with the separate question of the rights of discharged employees."

The military exchanges employ more than 100,000 persons (see note 2, *supra*). Had Congress intended to give that large group a forum in which to seek damages for employment grievances, it surely would have so indicated in the Senate or House Report or during the hearings or debates.[12] Moreover, it presum-

[11] Judge Skelton further noted (Pet. App., p. 14a):

"The legislative history speaks clearly and unambiguously. Public Law 91–350 was intended by Congress to waive sovereign immunity solely over claims of third party independent contractors arising as a result of contracts with nonappropriated fund instrumentalities such as the AAFES. The legislative history is silent concerning claims against the AAFES by employees. No reference is made to the lack of a Court of Claims forum for the resolution of pay claims or other employment grievances for AAFES employees. It seems clear to me that Congress did not intend to provide additional remedies for nonappropriated fund instrumentality employees when it passed Pub. L. 9–350 [*sic*]; its only aim was to correct an anomalous situation with respect to those third party independent contractors having explicit contracts with the Exchange Services."

[12] Indeed, Congress limited the amendment to a narrow category of claims that could be remedied without cost to federal taxpayers. The scope of the bill was narrowed considerably before passage, from coverage of any "nonappropriated fund activity of or under the United States or a department or agency of the United States," in an early version, to coverage of only the specifically enumerated instrumentalities listed in the final version (see Senate Report at 3–4). The Senate Report stated (at p. 5) that waiver should



ably would have done so explicitly and directly by bringing those employees within the ambit of the Lloyd-LaFollette Act and the Back Pay Act. But Congress did not do so, and it should not be presumed to have achieved by indirection what it did not do directly.

When Congress has intended to legislate with respect to the rights of military exchange personnel, it has done so specifically and expressly. Congress expressly excluded such employees from laws administered by the Civil Service Commission, including provisions for money damages for wrongful discharge (see pp. 12–13, *supra*). It expressly included such employees within other remedial legislation relating to employees (*ibid.*). In contrast, the 1970 amendment to the Tucker Act contains no reference to the right of military exchange employees to sue for back pay. As the Fifth Circuit correctly observed in *Young* v. *United States, supra,* 498 F. 2d at 1217 (footnote omitted):

> * * * In construing the 1970 amendments to the Tucker Act, we cannot ignore the fact that, in the much larger statutory scheme embracing federal employment, Congress has, when it has thought such action appropriate, dealt with Exchange Service employees directly and specifically. In our view, this circumstance, coupled with the dearth of concern with employment relationships in the legislative history of the 1970 amendments, strengthens our conclusion

affect "only institutions capable of reimbursing the United States for money judgments incurred on their account and 'subject to control by the responsible officials of the Government.'"

that those amendments were not intended to extend Tucker Act jurisdiction to the sort of "contract" plaintiff asserts existed in this case.

Congressional silence about exchange service employees in the legislative history and in the language of the 1970 amendment to the Tucker Act can only mean that Congress did not recognize any substantive right in such employees to money damages for wrongful discharge and did not intend to waive sovereign immunity with respect to such claims. Furthermore, as we now show, that amendment by its terms does not confer jurisdiction over the kind of claim respondent asserts here.

### B. EMPLOYEES OF MILITARY EXCHANGES ARE FEDERAL EMPLOYEES WHO HOLD THEIR POSITIONS NOT BY EXPRESS OR IMPLIED CONTRACT BUT BY APPOINTMENT

The regulations presently governing employment in the Army and Air Force Exchange Service[13] specify that "[exchange service] personnel are Federal employees of an instrumentality of the United States within the Department of Defense" (AR 60–21/AFR

[13] The regulations now in effect as set forth in Appendix A to this brief, *infra*, pp. 1A–17A, are substantially similar to the regulations in effect during respondent's employment with the Army and Air Force Exchange Service, from April 1958 to August 1968. The regulations periodically were reissued with slight modifications during the nine-year interval. Indeed, the very fact that the terms of respondent's employment underwent such regular and unilateral modification belies his contention that he had an express or implied contract with the exchange service. Pertinent provisions of the regulations in effect near the start of respondent's employment (AR 60–21/AFR 147–15, (May 14, 1959)) are set out at Appendix B, *infra*, pp. 18A–32A.



147–15 (November 12, 1974), Chapter 1, Section I, para. 1–7, App. A, *infra*, p. 3A) and that such personnel, with limited exceptions,[14] hold their positions by appointment (*id.*, Section II, para. 1–9*f*, Chapter 2, Section I, para. 2–2*a*, 2–3, App. A, *infra*, pp. 3A–4A, 5A–6A). In other words, exchange service employees are federal employees, albeit in a special category, and like other federal employees they hold their positions by appointment and not by contract.[15]

Like other federal employees, those in the Army and Air Force Exchange Service are barred from taking part in partisan political activities (AR 60–21/AFR 147–15 (November 12, 1974), Chapter 1, Section III, para. 1–13*b*(2), App. A, *infra*, p. 4A), from advocating the violent overthrow of the United States or from belonging to any organization which so advocates (*id.*, para. 1–17*a* and *b*, App. A, *infra*, p. 4A), and from participating in a strike against the United States (*id.*, para. 1–17*c*, App. A, *infra*, p. 4A). They are subject to statutes, regulations, and Executive Orders relating to the safeguarding of classified government information (*id.*, para. 1–21*c*, App. A, *infra*, p. 5A), and, prior to employment, they must receive

[14] Only in isolated cases will a military exchange enter into a contract of employment. See, *e.g.*, *Borden* v. *United States*, 126 Ct. Cl. 902, 116 F. Supp. 873.

[15] The Court of Claims premised its contrary holding upon a determination that an employee of a military exchange has a contractual relationship with his employer. The court relied upon its decision in *Keetz* v. *United States*, 168 Ct. Cl. 205. But in *Keetz* the court simply asserted, without analysis, that a contractual relationship existed; hence, *Keetz* is not persuasive authority for that proposition.

security clearance (*id.*, para. 1–22*a*, App. A, *infra*, p. 5A). They are paid according to wage schedule similar to the Classification Act General Schedule, which governs Civil Service personnel (*id.*, Chapter 2, Section II, para. 2–12*b*, App. A, *infra*, p. 6A; Chapter 4, Section II, para. 4–19, App. A, *infra*, pp. 7A–8A).

Like other federal employees, their employment may be terminated only for cause, such as gross inefficiency (*id.*, Chapter 3, Section I, para. 3–7), insubordination, or violation of law (*id.*, para. 3–4*a*(2), (3), App. A, *infra*, p. 6A).

Regulations governing the dismissal of exchange service employees provide all administrative procedures required for dismissal of Civil Service employees (*id.*, Chapter 3, Section I, as amended by Exchange Service Bulletin No. 247 (15–52), July 2, 1975).

Finally, exchange service employees are deemed "federal employees" for whose tortious actions the United States is liable under the Federal Tort Claims Act, 28 U.S.C. 1346(b). See, *e.g.*, *Rizzuto* v. *United States*, 298 F. 2d 748, 749–750 (C.A. 10); *United States* v. *Holcombe*, 277 F. 2d 143 (C.A. 4); *United States* v. *Forfari*, 268 F. 2d 29, 31 (C.A. 9); *Grant* v. *United States*, 162 F. Supp. 689 (S.D.N.Y.). Likewise, because they are considered to be federal employees, they have no cause of action under that Act. See, *e.g.*, *Daniels* v. *Chanute AFB Exchange and United States*, 127 F. Supp. 920 (E.D. Ill.).

Federal employees who hold their positions by appointment do not have a contractual relationship with the government. See, *e.g.*, *Taylor and Marshall* v.



*Beckham*, 178 U.S. 548, 576–577; *Crenshaw* v. *United States*, 134 U.S. 99, 104–108; *Urbina* v. *United States*, 428 F. 2d 1280, 1283–1284 (Ct. Cl.). Their employment rights derive from statute or regulations, not from any contract, express or implied. See, *e.g.*, *Sampson* v. *Murray*, 415 U.S. 61, 70.

The regulations governing employment in the Army and Air Force Exchange Service confirm this distinction. Authority to *appoint* personnel is vested in the Commander of the Army and Air Force Exchange Service and a Board of Directors (AR 60–21/AFR 147–15 (November 12, 1974), Chapter 1, Section II, para. 1–9, App. A, *infra*, pp. 3A–4A). The Commander is also authorized "[i]n unusual circumstances" to conclude "a special employment agreement with an individual employed to accomplish a specific function in a specified period of time" (*id.*, Chapter 4, Section II, para. 4–19*b*(4), App. A, *infra*, p. 8A). Appointees' wages are fixed in accordance with specified schedules (*id.*, Chapter 2, Section II, para. 2–12*b*(1), App. A, *infra*, p. 6A); only "when the employee is hired pursuant to an employment contract" is payment made "[i]n accordance with the terms of the contract" (*id.*, para. 2–12*b*(2), App. A, *infra*, p. 6A).

Respondent was not "hired pursuant to an employment contract."[16] To the contrary, like the great ma-

[16] For a contract to exist, there must be a meeting of the minds and mutual consent to be bound. See, *e.g.*, *J. C. Pitman & Sons, Inc.* v. *United States*, 161 Ct. Cl. 701, 705, 317 F. 2d 366, 368; *Porter* v. *United States*, 204 Ct. Cl. 355, 365–366, 496 F. 2d 583, 590; *Algonac Manufacturing Co.* v. *United States*, 192 Ct. Cl. 649, 428 F. 2d 1241. The Army and Air Force Exchange Service has evinced no intention to contract with respondent.

jority of exchange service employees, respondent was appointed to his position in the Army and Air Force Exchange Service. His claim, therefore, was not based upon an express or implied contract. Accordingly, the Court of Claims lacked jurisdiction to consider it.

This is the only conclusion that accords with the history of judicial review of federal employee claims. Prior to enactment of the Lloyd-LaFollette Act and the Back Pay Act, federal personnel actions were not subject to judicial review. Courts repeatedly refused to intervene where an employee claimed that he had been wrongfully discharged. See, *e.g.*, *Sampson* v. *Murray, supra*, 415 U.S. at 69–70; *Keim* v. *United States*, 177 U.S. 290, 293–296.

Since Congress has not extended the protections of the Lloyd-LaFollette Act and the Back Pay Act to exchange service employees, of necessity such employees stand in the same posture as did other federal employees before enactment of those Acts. By assuming jurisdiction here, the Court of Claims has in effect exercised a legislative power to extend those Acts to exchange service employees—a legislative power that Congress has refused to exercise.[17]

[17] Apparently underlying the Court of Claims' decision was its concern that the unavailability of a Tucker Act remedy in these circumstances would work a "harsh result" (Pet. App., p. 9a). That, of course, was, within constitutional limits, a matter for Congress to decide. But the Court of Claims in any event erred in believing that exchange service employees would thereby be left without redress for wrongful discharge. As noted above (n. 3, *supra*), a discharged employee of the Army and Air Force Exchange Service is entitled to administrative review of the propriety of his discharge. The district courts have jurisdiction to review the administrative proceedings to ensure that they complied with the review procedures established by regulation. See *Service* v. *Dulles*, 354 U.S. 363; *Vitarelli* v. *Seaton*, 359 U.S. 535; *Taylor* v. *United States Civil Service Commission*, 374 F. 2d 466 (C.A. 9); *McTiernan* v. *Gronouski*, 337 F. 2d 31 (C.A. 2).



## CONCLUSION

The judgment of the Court of Claims should be reversed.

Respectfully submitted.

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## APPENDIX A

5 U.S.C. (Supp. III) 2105(c) provides:

An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of—

(1) laws (other than subchapter IV of chapter 53 and sections 5550 and 7154 of this title administered by the Civil Service Commission; or

(2) subchapter I of chapter 81 and section 7902 of this title. This subsection does not affect the status of these nonappropriated fund activities as Federal instrumentalities.

32 C.F.R. 554.2(a) provides:

*Exchange service.* Exchange service is the provision to authorized patrons of merchandise and services of necessity and convenience not furnished from Federal appropriations.

32 C.F.R. 554.4 provides:

It is the purpose of the Secretary of the Army and the Secretary of the Air Force to provide a centrally governed and jointly operated worldwide exchange service to accomplish the following objectives:

(a) Adequate and substantially uniform exchange services to meet the needs of the Army and the Air Force.

(b) Lowest possible prices substantially uniform worldwide.

(c) Reasonable profits as are determined necessary to supplement appropriated funds for the support of Army and Air Force welfare and recreational programs.

(d) Joint Service participation in the use of funds, inventory, personnel, and facilities, and in the organization of operating elements on a geographical basis.

(e) Maximum management efficiency through the application of modern business methods, uniform operational and fiscal controls, and optimum use of combined resources.



597-252—75——8

(f) A soundly financed, flexible exchange service organization responsive to command and logistic requirements, in both peace and war.

(g) Maximum coordination in the provision of procurement, warehousing, inventory control, and distribution services to avoid uneconomical duplication of these activities.

32 C.F.R. 554.5 provides:

The Army and Air Force Exchange Service (A&AFES) is the entity embracing the activities, personnel, property, and nonappropriated funds through which exchange service is provided within the Army and the Air Force.

(a) The Board of Directors, Army and Air Force Exchange and Motion Picture Services (Board of Directors) is responsible to the Secretary of the Army and the Secretary of the Air Force through the respective Chiefs of Staff for directing the A&AFES.

(b) The Chief, A&AFES, acting for the Board of Directors, develops uniform operating policies, plans, programs, and procedures and, with his staff and field offices, administers the A&AFES.

(c) Army and Air Force major commanders are responsible for the establishment, operation, and command supervision of exchanges within their respective commands in accordance with Departmental directives.

(d) The establishment of an exchange is authorized at installations where military personnel are present and assigned for duty. An exchange may be established at a location other than an installation upon approval of the Department concerned if military personnel are present and assigned to duty at that location.

(e) Within the Continental United States, an exchange is established to serve one or more installations or a geographical area, which may involve one or more commanders. The exchange activities of two or more separate installations, Army or Air Force, may, by agreement between the commanders concerned, be combined in a parent-satellite relationship and operated as a single exchange.

(f) In oversea areas, an exchange system is established to serve a command or geographical area. Unless otherwise authorized by a Board of Directors, Army and Air Force personnel within a designated geographical area will be served by a single exchange system operated as a joint activity and governed by an area council responsible to the respective Army and Air Force component



commanders. The area council will be composed of equal Army and Air Force representation and the council chairmanship will alternate between the two Services.

32 C.F.R. 554.6 provides:

The A&AFES is an instrumentality of the United States. As such, it is entitled to the immunities and privileges enjoyed by the Federal Government under the Constitution, Federal statutes, established principles of International Law, and international treaties and agreements. The A&AFES is immune from direct State taxation and from State regulatory laws, such as licensing and price control statutes, whose application would result in interference with the performance by the A&AFES of its assigned Federal functions. Suits by or against the A&AFES or individual exchanges are in legal effect suits by or against the United States and must be brought in the name of the United States. However, claims against the A&AFES or individual exchanges and judgments, including compromise settlements of court actions, against the United States arising out of exchange activities are payable solely out of A&AFES funds.

32 C.F.R. 554.11 provides:

(a) *Military.* Army and Air Force officers will be in executive control of the A&AFES. Enlisted personnel will only be assigned to exchange duty as prescribed in applicable directives. Enlisted personnel employed during off-duty hours to supplement available civilian manning will be compensated from A&AFES funds.

(b) *Civilian.* Civilian personnel paid from A&AFES funds will be utilized to satisfy normal administrative and operational manning requirements within the exchange service. Policies and procedures governing the administration of A&AFES civilian employees will be in accordance with the Act of 19 June 1952 (5 U.S.C. 105k, k–1) and applicable departmental directives.

ARMY REGULATION NO. 60–21/AIR FORCE REGULATION NO. 147–15 (NOVEMBER 12, 1974) provides in pertinent part:

* * * * *

**1–7. Status of employees.** *a.* AAFES personnel are Federal employees of an instrumentality of the United States within the Department of Defense.

* * * * *

**1–9. Personnel authority.** *a.* The authority to establish personnel policy is vested in the Board of Directors, Army and Air Force

Exchange and Motion Picture Service, hereinafter referred to as the Board of Directors.

* * * * *

*f.* The authority to appoint and promote AAFES employees with or to grades designated above USP 15 is vested in the Board of Directors.

*g.* Authority must be exercised in accordance with this regulation and procedures published by the Commander, AAFES.

* * * * *

**1–13. Political activity of Federal employees.** *a.* No inquiry will be made concerning the political affiliations of an employee or applicant for employment with the AAFES and any such disclosure will be ignored. The foregoing is not intended to preclude inquiry as to organizational memberships which are by law or regulation a disqualification for employment or retention with the Federal Government.

*b.* No person within AAFES will—

(1) Use his official authority or influence for the purpose of interfering with an election or of affecting its results.

(2) Take any active part in partisan political management or partisan political campaigns.

*c.* All persons, however, will retain the right to vote as they choose and to express their opinions on all political subjects and candidates, and to participate in nonpartisan political activity.

* * * * *

**1–17. Loyalty and striking.** No person shall accept or hold office or employment in the Government of the United States or any agency thereof, including wholly owned government corporations who—

*a.* Advocates the overthrow of our constitutional form of government in the United States;

*b.* Is a member of an organization that advocates the overthrow of our constitutional form of government in the United States, knowing that such organization so advocates;

*c.* Participates in any strike or asserts the right to strike against the Government of the United States or such agency; or

*d.* Is a member of an organization of government employees that asserts the right to strike against the Government of the United States or such agencies, knowing that such organization asserts such right.

* * * * *



**1–21. Safeguarding information.** *a.* AAFES employees will not disclose or discuss official records and business of AAFES at any time, except as necessary to discharge official duties.

*b.* It is intended to prohibit the prior distribution of official information not available to the general public to individuals who would gain an advantage not accorded others. It is not intended that unclassified information which may be released should be withheld from the press or the public.

*c.* Each employee is subject to penal laws, regulations, and Executive Orders relating to safeguarding classified information.

**1–22. Security clearance for civilian personnel.** *a.* Army or Air Force regulations concerning nonappropriated fund civilian personnel security investigations and adjudications apply to AAFES employees at installations of the Army and Air Force, respectively.

* * * * *

**2–2. Appointment criteria.** *a.* To be considered for appointment, an individual must submit a complete and accurate application for employment reflecting that the individual meets the minimum requirements for the position under consideration.

* * * * *

**2–3. Appointment.** *a.* After selection of an individual for appointment, but prior to official appointment, each individual must submit the following:

(1) Evidence that he is in satisfactory physical condition, if requested. The appointing authority may, if he deems it advisable, require a medical certification or physical examination at AAFES expense.

* * * * *

*c.* Official appointment will be effective upon issuance to the individual of a copy of a properly executed AAFES personnel action. The effective date of appointment will be the date indicated on the personnel action.

*d.* Appointments are considered probationary for the periods specified below and these periods may not be extended.

(1) Positions paid under the Universal Salary Plan, management trainee program and college trainee program—1 year.

(2) All other positions—90 days.

*e.* Employees will not be appointed to part-time, temporary or on-call employment for the purpose of determining the employee's suitability for regular full-time employment.

*f.* Employees will be appointed to step 1 of the grade assigned to the position the employee will occupy, except that:

(1) Employees with special qualifications or experience may be appointed to step 2.

(2) Employees who will require further training may be assigned to a lower grade, in accordance with the provisions on training assignment in section I, chapter 4.

(3) Upon specific approval by the Commander, AAFES, an employee can be appointed to a step higher than step. 2.

* * * * *

**2–12. Employee utilization, payment, and benefits.** *a.* Regular full-time, regular part-time, temporary full-time, temporary part-time, and on-call employees will be utilized to perform approved standard and nonstandard jobs. Casual employees may be utilized to fill unskilled non-recurring jobs.

*b.* Payment may be made—

(1) In accordance with the Universal Salary Plan, Hourly Pay Plan, or Commission Pay Plan for all employees, except casual employees. To regular part-time employees, in accordance with the Universal Salary Plan, if approved by the Commander, AAFES.

(2) In accordance with the terms of the contract when the employee is hired pursuant to an employment contract.

* * * * *

**3–4. Verbal reprimand.** *a.* A verbal reprimand may be given by the employee's supervisor based upon any of the following:

(1) Failure to adequately perform his job as set out in the employee's job description.

(2) Conduct on the job involving insubordination, violation of laws, regulations, rules or procedures, or other conduct incompatible with maximum employee efficiency.

(3) Conduct off the job reflecting discredit on AAFES.

* * * * *

**3–8. Separation for cause.** An employee may be separated for cause (sec. II, this chap.) by the official with authority to separate the employee (sec II, chap. 1) on the basis of conduct specified in paragraph 3–4*a*(2) or (3) when—

*a.* Other disciplinary actions and/or counseling are determined to be inappropriate, or

*b.* Other disciplinary actions and/or counseling have been utilized without apparent success, and



*c.* The act of misconduct or delinquency is of such a nature or so repetitious that retention of the employee in any capacity is determined to be incompatible with the best interest, AAFES.

* * * * *

**4–19. Rates of pay and pay plans.** Rates of pay will be determined on the basis of the duties and responsibilities of the job (except as provided in para 4–11 and sec II, chap. 5) and generally will be commensurate with the prevailing rates for comparable work on a local, sectional, or nationwide basis. In oversea areas, rates of pay for US citizens will be fixed in conformity with rates paid for work of a comparable level of difficulty and responsibility to employees assigned in the United States, to the extent consisent with oversea major command policy. United States citizen employees in oversea areas whose rates of pay are so fixed will be paid allowances and differentials pursuant to Executive Order 11137 of 7 January 1964.

*a.* The following pay plans are authorized:

(1) Universal Salary Plan (USP)

(2) Hourly Pay Plan (HPP).

(3) Commission Pay Plan.

(4) Special employment agreement.

*b.* Rates of pay, structure, and availability of the authorized pay plans will be established as described below.

(1) The rates and grade and step structure of the Universal Salary Plan will be commensurate with the rates and grade and step structure of the Civil Service General Schedule. A special "A" grade conversion schedule will be published by the Commander, AAFES for compensation of those employees retaining eligibility for payment at "A" rates earned under previous classification policies. When General Schedule rates are changed, the Commander, AAFES, will adjust the USP rates to insure that they continue to be commensurate. The USP is applicable to executive, managerial, professional, and technical jobs and the employees occupying those jobs in accordance with job classification procedures established by the Commander, AAFES. In foreign areas, the USP is applicable only to US citizens and US nationals. The rates and structure for Special Rate will be as prescribed by the Board of Directors as a level higher than grade USP 15. Special Rate is applicable to positions and individual employees, as approved by the Board of Directors.

(2) The rates of pay for the HPP will be established by the Department of Defense Nonappropriated Fund Salary and Wage

Fixing Authority (DOD, NAF, S&WFA). In the 50 states, the District of Columbia, Guam, and Puerto Rico, the approved rates are based upon the average of rates paid by reputable employers in the community for similar work under similar conditions, as determined on the basis of locality wage surveys. In other areas, local conditions, oversea major command policies, and applicable treaties and agreements will be considered in determining the approved rates. The HPP consists of a series of wage schedules containing five steps in each grade, the number of which is approved by the Commander, AAFES. The HPP is applicable to administrative support, patron services, craft and trades, craft and trades (leader), and craft and trades (supervisor) jobs, and to the employees occupying these jobs in accordance with position classification procedures established by the Commander, AAFES, pursuant to DOD, NAF, S&WFA job grading standards.

(3) Rates paid under the Commission Pay Plan will be computed on the basis of an established percentage of sales volume attributable to the employee. The commission percentage will be established by the Commander, AAFES, on the basis of locality wage surveys in the 50 United States, the District of Columbia, Guam and Puerto Rico, or upon approprite data from other sources. The Commission Pay Plan is applicable to jobs for which it is deemed appropriate by the Commander, AAFES.

(4) In unusual circumstances, as determined by the Commander, AAFES, rates of pay other than those established under the pay plans described in (1), (2), and (3) above may be established by the Commander, AAFES, for the purpose of concluding a special employment agreement with an individual employed to accomplish a specific function in a specified period of time. This authority may not be delegated. Rates of pay for such special employment will not exceed the maximum rate of grade USP 15.

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EXCHANGE SERVICE BULLETIN NO. 247 (15-52) (JULY 2, 1975), provides in pertinent part:

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ADVERSE ACTIONS AND ADMINISTRATIVE APPEALS

81. The provisions of this directive pertaining to adverse actions and administrative appeals apply to regular full-time and regular part-time employees.

82. The advance notice of an adverse action will be in writing and will:



a. Identify the specific adverse action contemplated.

b. State the effective date of the action contemplated, which will be no earlier than 30 calendar days following the employee's receipt of the advance notice.

c. State specifically and in detail the reasons for the adverse action contemplated, with sufficient information (such as dates, places, events, names, etc.) to ensure that the employee understands the reasons for the proposed action and to afford him a fair opportunity to respond.

d. Advise the employee of his right to reply, orally, and/or in writing, and to submit affidavits in support of his reply. The employee will be afforded an opportunity to be accompanied by a representative during his oral reply if he so requests. Any expenses involved in making an oral reply will be borne by the employee. He will be permitted to make any presentations he feels are relevant and should be considered before the final decision. The right of reply does not include the right to a hearing with testimony from witnesses for both sides of the controversy, but is an opportunity for refutation of the advance notice. When a reply is made orally, a written record will be made and, if possible, the signature of the employee will be added as an indication that he agrees with its accuracy.

e. Identify the official to receive the written or oral reply.

f. Advise the employee that the reply must be filed within five workdays of receipt of the advance notice of the proposed action but that, upon good cause shown, the official with authority to separate may extend the period to reply up to an additional five workdays or a total period not to exceed 10 workdays from the employee's receipt of the advance notice of the proposed action, provided the request for extension is received within five workdays of the employee's receipt of the advance notice.

g. Advise the employee that his reply to the advance notice of adverse action will be given full consideration before a final decision is made.

h. Inform the employee that a written final decision will be made within 10 workdays of receipt of his reply or, if no reply is made within the authorized reply period, a written final decision will be made following expiration of the authorized reply period.

83. Within 10 workdays of receipt of the employee's reply and after giving full consideration of the employee's reply or, if no reply is received, on the day following expiration of the authorized reply period, the official taking the action will make a final deci-

sion. If the decision is to withdraw the action, the employee will be notified in writing. If the decision is adverse to the employee, whether it is to take the same action originally contemplated or a less severe action. the employee will be advised of the action to be taken. (If the official taking the action has made a decision to impose a less severe action, a new advance notice is not necessary.) The final decision will be in writing and will:

a. Reference the advance notice of adverse action.

b. Advise the employee, if a reply was received, that full consideration was given to his oral and/or written reply; or if no reply was received, state that no reply was received.

c. State the action to be taken and the paragraph of this directive under which it is being taken.

d. State the basis for the action and which of the reasons in the advance notice of proposed action were resolved in favor of the employee and which against the employee. (The final decision will not add to the reasons stated in the advance notice.)

e. State the effective date of the action (which must be at least 30 calendar days from the date the employee received the advance notice of the action).

f. State that this is the official's final decision.

g. State that, within 21 calendar days of the receipt of the final decision, the employee may initiate, under the provisions of this directive, an appeal of the action taken. Any appeal submitted must contain a statement that the employee either does or does not desire an evidentiary hearing. The employee should also be advised that assistance on the format and procedures involved in filing the appeal may be obtained from the servicing personnel office.

h. Advise the employee of his right to be represented by counsel or any other individual secured by the employee at his expense in presentation of his appeal.

84. The final decision will be furnished the employee by one of his supervisors. The time and date of delivery will be noted on a copy to be retained by the official making the final decision. If the employee is absent, the final decision will be sent to him at the last-known address by certified mail, return receipt requested.

85. An appeal from a final decision must be submitted within 21 calendar days of the employee's receipt of the written final decision. Upon request. the appellant will be provided assistance by the servicing personnel office in preparing a written appeal. Neither the appellant nor his representative will be intimidated or coerced in an effort to discourage the appellant from exercising his



right to appeal, nor will an appellant or his representative be discriminated against or reprisals be taken because of the exercise of such right. If the appellant chooses to be represented by an AAFES empoyee, and if the employee selected by the appellant consents and is determined, by appropriate authority, to be reasonably available, such employee will be made available. If an AAFES employee is so designated, he may have reasonable time off from his duties for the purpose of representing the appellant. AAFES employees assigned to the office of the General Counsel, to personnel duties, or to security duties may not serve as the appellant's representative. Appellants may not have more than two representatives including legal counsel. If the appellant has two representatives, one must be designated as his lead representative.

86. Disciplinary adverse actions which may be appealed under the procedures prescribed in paragraphs 81 through 98 of this directive are:

a. Suspension without pay for more than 30 calendar days.

b. Separation for cause.

c. Withdrawal of EMP status, except for declination of transfer or for unsatisfactory performance.

87. Nondisciplinary adverse actions which may be appealed under the procedures prescribed in paragraphs 81 through 98 of this directive are:

a. Downgrade or reduction in compensation except terminations of temporary promotions, terminations of details, or as a result of rehire.

b. Separation for RIF.

c. Separation for disability or for maternity.

d. Downgrade or reduction in compensation for unsatisfactory performance.

e. Withdrawal of EMP status for unsatisfactory performance.

f. Separation for unsatisfactory performance.

88. The adverse actions set out in paragraphs 86 and 87 above are the only adverse actions from which an employee may appeal under the procedures prescribed in paragraphs 81 through 98 of this directive. Except for the adverse actions set out in 87d, e and f above, appeals from nondisciplinary actions may be made only on the basis of procedural errors or discrimination, other than discrimination which would be a basis for consideration under equal employment opportunity procedures.

89. If an employee desires to appeal an adverse action, he must address his appeal to the appellate authority through the official

making the final decision and the management official, if they are not one and the same. The appeal may contain affidavits, documentary evidence and arguments in support of the employee's appeal; and must contain a statement that the appellant does or does not desire an evidentiary hearing. The name and address of the appellant's representative, if any, must also be stated in the written appeal. The appellant must state the basis for his appeal in sufficient detail to permit a hearing examiner to understand the basis. He must also state the remedy requested, which must be personal to him. The issues to be brought before a hearing will be limited to those set forth by the appellant in his written appeal; however, the appellant may, by letter received by the hearing examiner 10 or more workdays prior to the date set for the convening of the hearing on the appeal, amend his appeal to add new issues. A copy of any letter amending an appeal must also be sent to the management official at the same time it is mailed or delivered to the hearing examiner.

90. Upon receipt of an appeal from an adverse action, the management official will, within five workdays of receipt of the appeal, forward the entire file to the hearing examiner. The file forwarded will include the appeal, together with all evidence submitted by the appellant, the evidence upon which the final decision to take the adverse action was based, and a copy of the final decision notifying the appellant of the adverse action.

91. Upon receipt of an appeal from an adverse action, the hearing examiner will ascertain whether the appeal is in accordance with the requirements of paragraphs 81 through 98 of this directive. If it is ascertained that the appeal does not comply with these requirements, the hearing examiner will return the appeal to the appellant with a written explanation as to why it was not accepted and, where applicable, refer to the paragraph or paragraphs of this directive that are the basis for not accepting the appeal. The appellant will be given five workdays from date of receipt of the hearing examiner's letter to resubmit his appeal. If the employee fails to resubmit his appeal within five workdays, the appeal will be considered withdrawn. The determination of the hearing examiner regarding acceptance of an appeal is final and not subject to further appeal or review. The determination of the hearing examiner will be forwarded through channels to the employee with a copy to the management official and to the official making the final decision.

92. If the employee does not affirmatively request an evidentiary hearing, a recommendation on the appeal may be rendered by the



hearing examiner on the relevant evidence submitted. However, the hearing examiner may request additional evidence from either the appellant or the official making the final decision prior to making a recommendation.

93. If the employee affirmatively requests an evidentiary hearing or if the hearing examiner determines that an evidentiary hearing is necessary, a hearing will be conducted by a hearing examiner.

94. *Preparating for hearing.* The management official will select an individual to prepare and present the case for management. The appellant and the management official will notify the hearing examined in writing of the names and addresses of their representatives in advance of the hearing.

a. The management official will provide facilities, including recording equipment and a court reporter or stenographer, as determined necessary by the hearing examiner, and will perform other related functions as prescribed by the Commander, AAFES.

b. The hearing examiner is authorized to consult with the appellant and the management official and/or their representatives on an informal basis in advance of the hearing in order to clarify the issues, attempt an informal resolution, secure agreement as to certain undisputed facts, and attempt to narrow the issues to be considered during the hearing.

95. *Hearing examiners.* A hearing examiner will be responsible for establishing the date, time, and place of the hearing, and for giving advance notice in writing to all persons concerned in the case, with instructions regarding the nature of their participation. Such notice will include: the date, time, and place of the hearing; a statement of the purpose of the hearing and of the right of both the appellant and management to produce evidence in their behalf in documentary form, or by testimony of witnesses; a statement of the right of both the appellant and management to secure assistance and information from the servicing personnel office; and a statement advising the appellant of his right to have representation and his responsibility in arranging for that representation.

a. The hearing examiner will conduct the hearing in accordance with procedures prescribed and published by the Commander, AAFES. The functions of the hearing examiner are to identify the issues involved, to ascertain and acquire all relevant facts, to evaluate and weigh those facts, to make findings of fact, and to render a written recommendation on the appeal to the appellate authority. The hearing examiner will prepare a record

of the hearing which will include a verbatim transcript or, at his option, a summarized record of the hearing, a statement of the issues involved, appropriate findings of fact and a written recommendation, including recommendations for corrective action where required.

b. Evidence introduced during the hearing will be limited by the hearing examiner to matters material and relevant to the appeal. Strict adherence to the formal rules of evidence will not be required.

c. When all evidence has been obtained, including that contained in the transcript of the hearing when a hearing is conducted, the appeal and evidence will be reviewed by the hearing examiner. Unless further evidence is required, the hearing examiner will make a written recommendation on the merits of the appeal and transmit it to the appellate authority. The hearing examiner may recommend modification, if appropriate, of any action which has been taken. The hearing examiner may recommend appropriate corrective action to facilitate implementation of the recommendation.

96. *Record of hearing.* The transcript of any hearing will be prepared in duplicate. The original will be forwarded to the hearing examiner who conducted the hearing and the duplicate will be forwarded to the management official. A copy will be made available, by the management official, for the use of the appellant. The hearing record will include as a minimum:

a. The request for a hearing.

b. Notice of the hearing.

c. The transcript of the hearing with exhibits.

d. The hearing examiner's report which will include:

(1) A statement of the issues.

(2) A statement of the findings of fact.

(3) The hearing examiner's recommendation.

97. *Appellate authority.* a. The appellate authority is the Commander, AAFES or, in his absence, the Deputy Commander, AAFES. However, if the Commander, AAFES is the management official, the appellate authority will be the Chairman, Board of Directors, Army and Air Force Exchange and Motion Picture Services.

b. The appellate authority will secure the legal advice of his servicing General Counsel prior to rendering his determination except that, when the Chairman of the Board of Directors is the appellate authority, he will secure the legal advice of the Judge



Advocate General of the Army or of the Air Force, as appropriate, prior to rendering his determination.

98. *Determination by appellate authority.* The appellate authority will render a written determination on the appeal. The appellate authority may approve, disapprove, or amend the recommendation of the hearing examiner; return the case for further hearing; or return the case for corrective action. The written determination will, unless the hearing is to be reopened or unless other corrective action requiring further review is to be taken, include a statement that the determination by the appellate authority is final and not subject to further appeal or review.

a. One copy of the determination will be forwarded to each of the following: the appellant, the hearing examiner, the management official, and any intermediate headquaters, as appropriate.

b. In the event a rehearing or further review is ordered, processing of the appeal will continue in accordance with paragraphs 94 through 98, as appropriate.

* * * * *

20. Advance notices of separation will be in writing, will provide for at least 30 calendar days' notice (unless a lesser period of advance notice is provided in Annex A), and will state:

a. The type of separation, including reference to the appropriate paragraph in this directive under which the separation action is taken.

b. The basis for the separation. The facts supporting the basis for separation must be stated specifically and in detail, with sufficient information (such as dates, places, events, names, etc.) to ensure that the employee understands the reasons for the proposed action and to afford him a fair opportunity to respond.

c. The proposed effective date of the separation. (All separations will be effective as of the close of business.)

d. That the employee has the opportunity to explain the circumstances and his views.

e. That the employee has a right to submit a reply orally and/or in writing and in the reply to set forth any matters, explanations, or denials the employee deems to be appropriate. (The employee will be afforded the opportunity to be accompanied by a representative during his oral explanation if he so requests. Any expense involved in making an oral reply will be borne by the employee.)

f. That the reply must be filed within five workdays of receipt of the advance notice of the proposed action but, that upon good

cause shown, the official with authority to separate may extend the period to reply up to an additional five workdays or a total period not to exceed ten workdays from the employee's receipt of the advance notice of the proposed action, provided the request for extension is received within five workdays of the employee's receipt of the advance notice.

g. Identify the official to receive the written or oral reply.

h. Advise the employee that his reply to an advance notice of separation will be given full consideration before a final decision is made.

i. Inform the employee that a written final decision will be made within 10 workdays of receipt of his reply or, if no reply is made within the authorized reply period, a final decision will be made following expiration of the authorized reply period.

21. Upon receipt of the employee's reply to an advance notice of separation, and after giving it full consideration, the official with authority to separate will advise the employee of the final decision in the matter. If, after considering the reply, the official with authority to separate has made a decision to take an action other than separation, he will advise the employee of the action to be taken. A new advance notice of the action to be taken is not necessary.

22. If the final decisions is to separate the employee, the decision will be in writing and will state:

a. The type of separation.

b. The basis for the separation.

c. The effective date of separation. (The effective date of separation must be after expiration of the advance notice period for the separation action.)

d. That full consideration was given to the employee's oral and/or written reply or, if no reply was received, state that no reply was received.

e. State which of the reasons in the advance notice of separation were resolved in favor of the employee and which against the employee. (The final decision will not add to the reasons stated in the advance notice.)

f. That this is the official's final decision.

g. That, within 21 calendar days following receipt of the final decision, the employee may initiate a complaint or a grievance under paragraphs 66 through 80 of this directive, or appeal of an adverse action under paragraphs 81 through 98 of this directive, whichever is appropriate, unless a complaint, grievance, or appeal



of an adverse action is otherwise excluded under the provisions of paragraph 3 of this directive.

h. That Federal Unemployment Compensation may be available. (He will be advised of the nearest office where he may seek advice.)

## APPENDIX B

ARMY REGULATION No. 60–21/AIR FORCE REGULATION No. 147–15 (MAY 14, 1959) provided in pertinent part

* * * * *

**7. Civilian personnel.** *a.* Exchange personnel are employees of an instrumentality of the United States which is an integral part of the Department of Defense. Since they are compensated out of nonappropriated funds, they are distinguished from other civilian employees of the Armed Services who are compensated from appropriated funds. *For example,* they are not held or considered as employees of the United States for certain purposes, such as the civil service laws and the Federal Employees Compensation Act (5 USC 150k). Compensation benefits for death or disability incurred in the course of employment are provided, however, for exchange civilian employees by AAFES in accordance with the provisions of the Nonappropriated Fund Employees Act (5 USC 150k–1). Civilian employees of AAFES are also entitled to benefits under the Federal Unemployment Compensation Act (AR 230–117 and AFR 176–3).

*b.* Policies, programs, and procedures governing the administration of civilian employees of the AAFES will be established by the Chief, AAFES, in accordance with the objectives of the Act of 19 June 1952 (5 USC 150k) and basic policies approved by the Board of Directors, AAFEMPS. See AR 60–21/AFR 147–15 and AR 60–29/AFR 147–23.





*c.* The official time of a civilian employee paid from appropriated funds may be used in the command supervision of exchanges but will not be authorized in the operations of exchanges.

*d.* Security clearance for civilian personnel.

(1) *Installation.* Army or Air Force regulations concerning nonappropriated fund civilian personnel security investigations and adjudications apply to Exchange Service personnel employed at installations of the Army and the Air Force, respectively.

(2) *Headquarters, A&AFES and service centers.* Security investigations and clearances of employees of Headquarters, A&AFES and service centers will be processed in accordance with AR 230–15 and AR 604–5. In addition—

(*a*) With respect to paragraph 19, AR 604–5, the Chief, A&AFES, is authorized to clear personnel within his specific area of jurisdiction for access to classified defense information, after appropriate investigation required by Army regulations has been accomplished. The Chief, A&AFES, may redelegate this authority to chiefs of service centers for personnel within their respective offices.

(*b*) The Chief, A&AFES, and chiefs of service centers will undertake the responsibilities prescribed in paragraph 10, AR 230–15, concerning employees in their respective offices and will furnish the required recommendations to the major commander responsible for the geographic area in which the office is located.

* * * * *

**11. Appointments.** Appointments of A&AFES employees will be made as follows:

*a.* Approval of appointments to Executive Management positions will be in accordance with chapter 7.

*b.* Appointments under the Universal Salary Plan

of Headquarters, A&AFES, and Service Center personnel who are not covered by the Executive Management Program will be subject to approval by the Chief, A&AFES. In exchange systems appointments under the Universal Salary Plan of personnel who are not covered by the Executive Management Program will be subject to approval by the responsible oversea major commander.

*c.* Appointments to positions under the Annual Salary Plan will be subject to approval by the installation commander, or his delegated representative upon recommendation of the exchange officer.

*d.* Appointments to positions under hourly wage schedules will be subject to the approval of the installation commander or his delegated representative.

* * * * *

**25. Authorized payment.** *a.* Payment of wages or salary to employees will be made in accordance with the employee's correct and currently approved grade and at the applicable rate specified on the appropriate wage or salary schedule authorized by the Chief, A&AFES.

*b.* Commission employees will be paid in accordance with the commission plan authorized by the Chief, A&AFES.

*c.* Local payment of earned salary or wages may be made at an employee's request in emergency situations involving death, accident, or serious illness in his immediate family or when delay occurs in receipt of his payroll check.

* * * * *

**48. Involuntary separations.** Involuntary separations are terminations of employment initiated by proper authority.



*a. Notice periods.*

(1) Employees serving in a probationary period may be separated at any time during that period without prior notice. In these separations employees will not have recourse to the grievance procedure.

(2) At the discretion of the responsible commander, pay in lieu of notice may be made for involuntary separations for other than cause. The following notice periods will apply (except as noted in (1) above) for involuntary separations other than for cause.

(*a*) Employees coming under the Universal Salary Plan (except as noted in (*b*) below) and Annual Salary Plan will be given 30 days' advance notice while in a pay and duty status if employed more than 1 year. Employees in these categories employed less than 1 year will be given 2 weeks' notice while in a pay and duty status.

(*b*) Executive Management Status employees will be given notice as set forth in chapter 7.

(*c*) All regular full-time and part-time hourly wage-schedule employees will be given 2 weeks' advance notice while in a pay and duty status.

(*d*) Employees in other categories may be given notice at the discretion of the exchange officer.

*b. Executive Management Status employees.* All involuntary separations of Executive Management Status employees will be coordinated with the Chief, A&AFES, in accordance with chapter 7. Separation procedures, including terminology, will be the same for all categories of personnel except where noted otherwise.

*c. Inefficiency separations.* Inefficiency separations will be made in accordance with paragraph 33.

*d. Reduction in force.* The following provisions apply in reduction in force, except for Executive Management Status employees covered in chapter 7:

(1) When the work requirements of an exchange necessitate abolishment of positions, the exchange officer will select the individuals to be released, basing selection upon the relative performance, potential, length of service, and veterans status, in that order, of all incumbents of positions identical or closely related to those being abolished.

(2) Before final separation of any employee selected for release, he should be considered for reassignment to all other positions in the exchange for which qualified.

(3) No employee affected by a reduction in force will be required to accept a different position or employment category. If an employee refuses an offer of a different position or employment category, the action separating the employee will be processed as a reduction in force.

(4) All notices of separation will be in writing, addressed to the employee concerned, and will contain the date of scheduled separation and the reason for it. When circumstances prevent the prescribed full period of notice being given, the employee will be granted pay for the balance of the required notice period.

*e. Separation for disability.* An employee may be separated for reasons of disability if at any time his physical or mental condition renders him incapable of performing the duties of his position for any indefinite period of time.

(1) Regular full-time employees separated for disability will be authorized payment of accrued sick leave until such leave has been exhausted (par. 69*h*). Use of sick leave in such cases will be in addition to regular notice periods authorized in *a* above.

(2) Employees whose disability was caused by intemperance or immoral or reckless conduct will not be



entitled to disability sick leave benefits or advance notice of separation. Decision in every case will be made by the commander concerned.

*f. Discharge for cause.*

(1) An employee may be discharged for cause for misconduct, delinquency, or for an act of conduct incompatible with continued employment. Repeated infractions that individually merited only a reprimand or other disciplinary action may be the basis for discharge for cause.

(2) Generally, an employee discharged for cause will be given 5 workdays advance notice of the intended discharge, or pay in lieu of notice. The advance notice or pay will be at the discretion of the exchange officer, depending upon the circumstances in each case. Whenever danger to life, well-being of individuals, or damage to property is involved, the employee will be separated without prior notice.

(3) The charges against an employee will be submitted to the personnel manager, or the person delegated responsibility for personnel functions, who will investigate them thoroughly and recommend to the exchange officer approval or disapproval of proposed discharge, giving all supporting facts disclosed by the investigation.

(4) If the discharge is approved, the exchange officer will advise the supervisor and initiating authority of the action and will notify the employee in writing, giving in the letter a complete statement of charges, the scheduled date of separation, and advising him of his rights under the grievance procedure. Employees will be requested to sign and return a copy of the proposed discharge as evidence that they have read the charges made and understand the reason for the discharge.

(5) If the discharge is not approved, the initiating official will be given the reasons for the decision reached.

*g. Grievance procedure for involuntary separations.*

(1) Employees separated involuntarily will be advised of their rights of appeal under the grievance procedure (sec. IV, ch. 5) and every assistance in preparing grievances will be given those employees by exchange personnel offices.

(2) Separation actions which cannot be appealed under the grievance procedure include disability and security separations.

* * * * *

**92. General.** The grievance procedure provides uniform treatment in matters affecting aggrieved employees and promotes sound employer-employee relations by requiring supervisors to make proper and responsible decisions in personnel matters. All exchange employees will be given opportunity to discuss problems with their supervisors and be free from restraint, interference, coercion, discrimination, or reprisal in filing grievances. All elements of the A&AFES will make known in writing to each of its employees that grievance procedures exist as an employee right.

**93. Scope.** These provisions are applicable to all exchange employes within CONUS and all United States citizen A&AFES employees wherever located. Officers in charge of exchange systems are authorized to make deviations in procedures when necessary and when required by major oversea command policy; however, the basic grievance requirement will not be abrogated through any procedural or administrative change.



**94. Rights of an aggrieved employee.** An aggrieved employee has the right to—

*a.* Present grievances to supervisors and officials on all matters except separation during probationary period, wage and salary schedules, and disability and security separations. As prescribed in paragraph 10, AR 60–20/AFR 147–14, complaints concerning discrimination in employment will be processed in accordance with the applicable provisions of AR 230–5 or AFR 176–1.

*b.* Be fairly and promptly heard and receive equitable consideration.

*c.* Designate a member of the grievance committee

*d.* Be afforded the assistance of the personnel manager, or the person delegated responsibility for personnel functions, in preparing his original case and appeal.

*e.* Be granted a hearing before a grievance committee.

*f.* Examine witnesses and reply to any adverse testimony or written evidence presented.

*g.* Be represented at the hearing by any person or by legal counsel from outside the exchange at his own expense.

*h.* Examine the reported minutes of the hearing and exhibits and make such extracts as deemed necessary.

*i.* Attend hearings without salary loss, penalty, or charge against leave (provided the employee has not been separated) except that, for sufficient cause, an employee may be placed in a leave without pay status through a proper suspension action. Employees may also use official time in reasonable amounts for securing advice on rights under applicable regulations, arranging for witnesses, or for obtaining other information or assistance which can only be obtained during normal duty hours.

*j.* Call witnesses and have representatives attend hearings without loss of pay or charge against leave, if they are employees of the A&AFES, provided in the opinion of the installation commander such witnesses are essential to the hearing and their testimony cannot be obtained through other means.

*k.* Appeal an adverse adjudication to proper higher authority.

*l.* So far as possible under law and regulations, be granted appropriate remedial action when a grievance is resolved in his favor.

**95. Grievance procedure.** Grievances will be settled as follows:

*a.* An employee who has a complaint will first report to his immediate supervisor. The supervisor will make every reasonable attempt to resolve it.

*b.* Should the employee be dissatisfied with the decision rendered by his immediate supervisor, he will present his complaint orally to the next higher supervisor who will informally investigate the facts of the case and attempt to resolve it.

*c.* If the complaint is against the immediate supervisor or if the employee believes that discussion of his complaint would be prejudicial to his interests, he may, after notifying his immediate superior, present his complaint directly to the next higher supervisor.

*d.* If the next higher supervisor does not satisfactorily adjust the complaint, the employee may present his complaint to the exchange officer for personal adjustment.

*e.* If the decision of the exchange officer is not acceptable to the employee, he may request a grievance hearing in writing through the exchange officer to the installation commander for the establishment of a committee (par. 96) to hear his grievance and make



recommendations. The request will contain a clear and concise statement of his grievance and the relief sought.

*f.* The provisions of *a* through *e* above will not preclude any employee from immediately requesting a grievance hearing in writing through the exchange officer to the installation commander, if the employee believes the nature of his grievance is such that it cannot be resolved by discussion with the supervisors.

*g.* A grievance will not be considered when it is submitted more than 21 calendar days after the receipt of any adverse personnel action or 21 calendar days after the incident which was the cause of the grievance.

**96. Establishment of grievance committee.** *a.* A grievance committee composed of three members not subordinate to the aggrieved employee will be established by the installation commander. Members will be selected as follows: one member will be selected by the aggrieved employee; one member by the installation commander; and the third member will be selected by the other two. The member designated by the installation commander may be a commissioned officer or a civilian exchange employee; the other two members of the committee will be civilian exchange employees. The installation commander will designate as chairman the individual considered best qualified to direct a fact-finding body. The chairman will designate one of the members as recorder. The personnel manager or his representative will serve as advisor to the committee with respect to pertinent procedures, rules, and regulations but will not in any case serve as a voting member of the committee.

*b.* When insufficient civilian employees are available at the installation to constitute a grievance com-

mittee in accordance with *a* above, the Chief, A&AFES, will make available to the installation commander a list of employees from neighboring exchanges. In oversea areas this list will be provided by the major commander concerned.

**97. Functions of grievance committee.** The committee is a fact-finding and advisory body. It has one primary purpose, which is to assist the installation commander in arriving at a prompt and fair decision by making a full and complete evaluation of the evidence in the case, by impartially appraising the evidence, and by forwarding to the installation commander a record of the hearing proceedings, a statement of the committee's findings, and its recommendations.

**98. Preparation for hearing.** a. The supervisor involved or any individual other than the exchange officer, can be designated to prepare and present the case for management.

*b.* The committee chairman will be responsible for giving advance notice in writing to all persons concerned in the case, with instructions regarding the nature of their participation. Notices will include date, time, and place of the hearing; a statement of the purpose of the hearing and of the right of both sides to produce evidence in their behalf in documentary form or by testimony of witnesses; a statement of the right of both sides to secure assistance and information from the personnel office and of the right of the aggrieved employee to have representation and his responsibility in arranging for that representation.

*c.* The grievance committee will meet at the call of the chairman and as often as necessary to complete the hearing and prepare its report.



**99. Hearing procedures.** Hearings will be conducted according to the following procedures:

*a.* Attendance at open sessions will be confined to those who have a legitimate interest in the proceedings as determined by the chairman, except that public hearings may be held at the discretion of the installation commander.

*b.* Introductory remarks by the chairman will include—

(1) Statement of purpose of the hearing.

(2) Introduction of committee members and participants.

(3) Brief statement of the case.

(4) Statement that burden of proof of grievance is upon complaining employee.

*c.* The chairman will advise committee members to—

(1) Act as a fact-finding body and avoid any semblance of a trial.

(2) Examine all individuals concerned in a manner that will obtain all relevant and material facts necessary for completion of the record.

*d.* Hearings will be conducted so as to encourage a frank and open discussion of all relevant facts. Legal rules of evidence will not be observed.

*e.* Documentary evidence to be introduced as exhibits will be identified and shown to the committee and all interested persons before being received in evidence.

*f.* Testimony of witnesses appearing before the committee may be recorded verbatim or in summarized form. The appointment of a hearing stenographer or reporter is authorized at the discretion of the installation commander.

*g.* The aggrieved employee will be permitted to testify in his own behalf, introduce documentary evi-

dence, call witnesses and to cross-examine adverse witnesses.

*h.* Witnesses will be excluded from the hearing except while giving testimony.

*i.* The chairman will advise witnesses in the case—

(1) To confine testimony to matters relevant to the case and to avoid discussion of extraneous issues.

(2) To introduce all evidence or other testimony at the hearing. It is important that all relevant material be included in the event of review by higher authority.

(3) That testimony must be clearly identified as being based either on hearsay or personal knowledge.

(4) If testimony refers to a conversation or occurrence, to state the date, place, and persons present at the conversation or occurrence.

*j.* Testimony will be given in the following order:

(1) By the employee and his witnesses, if any, subject to cross examination by management.

(2) By management and its witnesses, if any, subject to cross examination by the employee.

(3) Rebuttal.

(4) Summary.

*k.* Prior to adjournment, the chairman will advise all persons concerned that they may make any additional statement which they consider necessary to complete the record.

*l.* Upon completion of the hearing, the committee will meet in closed session, evaluate the evidence, formulate findings and recommendations, and prepare a report.

(1) The report and exhibits will be prepared (in quadruplicate) in the following manner: Pages will be numbered at the bottom; erasures, interlineations, and other changes will be initialed by the recorder or a member of the committee; an index will be attached giving a list of witnesses, page numbers of testimony,



and brief description of each exhibit, its designation by letter and page where introduced.

(2) The findings recorded will be a brief, coherent, and clear recital of the facts established by the evidence.

(3) Recommendations must be appropriate to and warranted by the findings and should include action to resolve the grievance.

(*a*) Recommendations will be determined by majority vote of the committee members.

(*b*) In case of disagreement between members of the committee, any member may enter in the report his dissent and the reason for the dissent.

(4) Reports will be signed by all members of the committee.

(5) Upon completion of its hearings, the committee will submit its report to the installation commander. The installation commander will determine the action to be taken and forward his decision in writing to the employee, through the exchange officer, within 10 calendar days and advise him of his rights of appeal.

(6) The grievance committee is not authorized to furnish its report or copies of it to anyone other than the appointing authority.

**100. Rights of appeal.** *a.* If the employee does not accept the decision of the installation commander he may appeal the decision in writing within 15 calendar days after receipt of the decision, with the reasons therefor, through channels to the major commander concerned whose decision will be final.

*b.* Major commander may approve, disapprove, or amend the proposed settlement, or determine that the case should be reopened and further investigation and hearing be made, and will prescribe in detail further action which will be taken including necessary pay

adjustment, reinstatement, or other appropriate action.

*c.* The decision of reviewing officials within CONUS will be communicated to the exchange officer through channels within 15 calendar days following receipt of the appeal, and the employee will be immediately notified in writing of the decision made. In oversea reviews, the time will be determined by the responsible commander.

**101. Executive Management Status Employees.** *a.* In cases where Executive Management Status Employees are separated, a complete copy of the grievance report, appeal, and determinations will be forwarded to the Chief, A & AFES. Such employees may request the Chief, A & AFES to review the proceedings and determine eligibility for further employment as an Executive Management Status Employee.

*b.* The civilian members of the grievance committee will be Executive Management Status Employees.

APPENDIX C

UNITED STATES COURT OF CLAIMS

WASHINGTON, D.C.

Court of Claims No. 342-72

ROY C. HOPKINS V. UNITED STATES

STATE OF TEXAS,
*County of Dallas*, ss:

Colonel Robert Burns, USAF, General Counsel of the Army and Air Force Exchange Service, organized and existing under the regulations of the Army and Air Force of the United States, with headquarters in Dallas, Texas, deposes and says that the Plaintiff, Mr. Roy C. Hopkins, was appointed to employment with the Army and Air Force Exchange Service on 18 April 1958 and that appended hereto is a true copy of Mr. Hopkins' Army and Air Force Exchange Service Employee Service Record Card.

Dated in Dallas, Texas, on this the 18th day of July, 1973.

(s) ROBERT BURNS,
*Colonel, USAF,*
*General Counsel.*

Subscribed and sworn to before me on this the 18th day of July, 1973.

(s) JOANNA MUIR,
*Notary Public in and for*
*Dallas County, Tex.*

EMPLOYEE SERVICE RECORD CARD--ARMY AND AIR FORCE EXCHANGE SERVICE

RECORD OF EMPLOYMENT WITH THE EXCHANGE SERVICE

| Type of action | Effective date | Title of position | Position No. | Grade and step | Pay rate | Type of employment | Br. No. | Employing exchange or administrative unit |
|---|---|---|---|---|---|---|---|---|
| Appointment | Apr. 10, 1958 | Security inspector | 009 | 11-1 | 5,680 | RFT | | Hq AFEX, Insp Svcs, mz-kastel Germ |
| Init Transp/Agreem | Apr. 10, 1958 | Do. | 009 | 11-1 | 5,680 | RFT | | Do. |
| Reassignment | July 7, 1958 | Inspector | 009 | 11-1 | 5,680 | RFT | | Do. |
| Conv to USP | Oct 24, 1958 | Do. | 009 | 10-1 | 6,100 | RFT | | Do. |
| Stp Advance | Feb. 11, 1960 | Do. | 012 | 10-2 | 6,400 | RFT | | Do. |
| Partic. in Ret. Plan | May 1, 1960 | Do. | 012 | 10-2 | 6,400 | RFT | | Do. |
| Reassin/Promotion | Aug. 8, 1960 | Senior inspector | 011 | 11-1 | 6,700 | RFT | | Do. |
| Conversion | Sept. 9, 1960 | Do. | 011 | 11-1 | 7,300 | RFT | | Do. |
| Transfer | Aug. 26, 1961 | Chief, inspection and Security | U-013 | 11-1 | 7,300 | RFT | | Det 400, West Ruislip, England |
| Conversion | Oct. 18, 1962 | Do. | U-013 | 11-1 | 8,045 | RFT | | Do. |
| Conversion | Jan. 9, 1964 | Do. | 402 | 11-1 | 8,410 | RFT | | Do. |
| Revision Grp/Insur | Mar. 1, 1964 | Do. | 402 | 11-1 | 8,410 | RFT | | Do. |
| Merit step in/Grp Insur | Mar. 5, 1964 | Do. | 402 | 11-2 | 8,785 | RFT | | Do. |
| Sal. Conv | July 9, 1964 | Do. | 402 | 11-2 | 9,030 | RFT | | Do. |
| Change Title | May 27, 1965 | C/Safety and Security | 402 | 11-2 | 9,030 | | | United Kingdom Area Ex/W. Ruslip |
| Sal. Conv | Oct. 14, 1960 | Do. | 402 | 11-3 | 9,573 | | | Do. |
| W-G-S-I | Mar. 3, 1966 | Do. | USP | 11-4 | 9,879 | | | EES/United kindom AX/S & S Br. |
| Job Title Chg | Apr. 1, 1966 | C/area Safety Security branch | USP | 11-4 | 9,879 | | | Do. |
| Sal. Conv | July 7, 1966 | Do. | USP | 11-4 | 10,166 | USP-11 | | Do. |
| Do. | Oct. 12, 1967 | Do. | USP | 11-4 | 10,623 | USP-11 | | Do. |
| W-S-S-I | Feb. 29, 1968 | C/area S & S BR | USP | 11-5 | 10,945 | USP-11 | | EES/United Kingdom AX |
| Sal. Conv | July 4, 1968 | Do. | USP | 11-5 | 11,563 | USP-11 | | Do. |
| Sep. F. Cause | Aug. 6, 1968 | Do. | USP | 11-5 | 11,563 | USP-11 | | Do. |



U.S. GOVERNMENT PRINTING OFFICE: 1975